defense at trial and in the mitigation phase of death sentence proceedings. The issue before the Tenth Circuit related to what standard of review it should apply to the Oklahoma appellate court's denial of Mr. Alverson's appeal and petition for *habeas* relief.

Under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 (2007), the federal courts can review a state court's decision only if the state court's decision "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" (*Alverson*, p 1146). Thus, the issue before the Tenth Circuit was whether, under AEDPA, an indigent defendant's right to the assistance of a psychiatric/psychological expert is a "clearly established" due process right.

The Tenth Circuit Court of Appeals held that *Ake* is "clearly established" federal law and that the standard of review by the Federal Circuit Court of the OCCA-2 decision denying a defendant relief is whether the state court decision was "contrary to or an unreasonable application of the clearly established federal law" as decided by the United States Supreme Court. They further held that Mr. Alverson was provided with all the due process rights (i.e., access to expert assistance) that *Ake* requires. The Federal Circuit Court specifically noted that since the state at sentencing did not use an expert in predicting his dangerousness, then Mr. Alverson, under *Ake*, had no basis for his claim for funds for an expert for that purpose. Nor was he, under *Ake*, entitled to expert assistance to contradict the state's proofs of the other two aggravating circumstances that the death jury relied on to impose the death sentence on him.

Discussion

The United States Supreme Court set standards for an indigent defendant's right to a defense expert psychiatrist relating to the insanity defense at trial and to future dangerousness in the mitigation phase of death sentence proceedings. While the Tenth Circuit Court of Appeals in the current ruling has affirmed the *Ake* rights of indigent defendants to expert psychiatric assistance, they delineate that *Ake* does not require a defense psychiatric expert if the state has not used a psychiatrist to argue dangerousness in the mitigation phase of a death penalty trial. It appears that under the standards of review set out by the AEDPA, federal courts give great deference to state court decisions, and in this case, the state court defined the *Ake* due process right specifically to mean that if the state does not use a psychiatrist to prove dangerousness in the death penalty phase, then the defendant does not have the right to a psychiatric expert to rebut future dangerousness. Further, the court stated that the MMPI is not a valid test instrument for purposes of demonstrating the need for further neuropsychiatric testing. Thus, it concluded that Mr. Alverson did not meet the *Ake* burden, placed on the defendant, of making an initial showing of a need for further expert witness assistance.

In this case, the court concluded that Mr. Alverson merited only state-funded expert assistance under *Ake* for his initial evaluation by the social worker, Ms. Carlton, and the state trial court authorized funds for this evaluation. Because he was indigent, Mr. Alverson was without means to provide additional evidence of a need for further testing.

The *Alverson* case is, at bottom, a case about the degree to which indigents can, under *Ake*, have access to a psychiatric expert defense. The court here did not set an evidentiary bar to the admissibility of expert defense testimony that might be based on neuropsychology assessment or even indeed on possible magnetic resonance imaging (MRI) or other brain imaging tests and testimony. Essentially what the court of appeals held is that if a defendant cannot afford to pay privately for such expert assistance, he cannot expect, under the narrowly read due process protections of *Ake*, that public funds will be provided for a deeper or more exploratory expert defense. The case is a reminder that some constitutional due process protections provide merely a floor for the degree of assistance given to indigents, even those facing the death sentence, while placing no ceiling on the expert defenses available to those who can pay.

Disclosures of financial or other potential conflicts of interest: None.

Exception to Psychotherapist-Patient Privilege in Criminal Proceedings

Lawrence John Schloss, MD
Fellow in Forensic Psychiatry
Center for Forensic Psychiatry

Melvin Guyer, PhD, JD
Professor of Psychology

Department of Psychiatry
University of Michigan
Ann Arbor, MI

Utah Supreme Court Holds That the Psychotherapist-Patient Privilege Is Abrogated if Hatred as a Motivation to Lie Is an Emotional State of the Complainant and Thus Is an Element of a Criminal Defense

In *State v. Worthen*, 222 P.3d 1144 (Utah 2009), the Utah Supreme Court considered the state's interlocutory appeal of a trial judge's granting of Leroy Worthen's pretrial motion for an *in camera* review of his adopted daughter B.W.'s mental health records. He sought her psychotherapy records for the purpose of showing that B.W. directed extreme anger and hatred toward him, creating her motivation to make false allegations of abuse.

The issue before the court was whether the medical records sought by Mr. Worthen qualified as an exception to the psychotherapist-patient privilege under Utah Rule of Evidence 506 (d)(1) (1994), which allows for abrogation of the privilege if the emotional or mental condition of the complainant "is an element of any claim or defense."

Facts of the Case

In July 2005, Mr. Worthen's adopted daughter, B.W., attempted suicide following an argument with Mrs. Worthen. She was subsequently hospitalized for 19 days at the University of Utah Neuropsychiatric Institute [UNI] where she received individual, group, and family therapy. The discharge summary stated that B.W. "was highly skeptical that her family could care for her or love her [,]. . .looked for ways to interpret statements and behavior in a way to mesh with her negative thinking[,]. . .[and] was very prone to major misinterpretations" (*Worthen*, p 1147).

Also at this time, B.W. was journaling her hatred and anger toward her adoptive parents and her wishes to be with a different family. Excerpts from her journal include:

> My mom has pissed me off for the last time. . . . I feel as if I want to run out the door to [B.W.'s friend's house] and stay there 4-ever. Next time my mom gets me as pissed off as I am not [sic], I will KILL her, and that's a promise, I don't care what happens to me I just want her to die in her bed all alone in her own pain and blood! I will kill her if she gets me as pissed off as I am now. . . . I swear I'll kill the both of them! No matter what it takes [*Worthen*, p 1147].

Following her discharge from UNI, B.W. initiated outpatient therapy with Dr. Carolyn Henry. In October 2005, she disclosed to Dr. Henry allegations of sexual abuse by Mr. Worthen. Her allegations resulted in Mr. Worthen's being charged with 10 counts of aggravated sexual abuse. At his preliminary hearing, B.W.'s testimony and her journal entries were found to have some inconsistencies. In a pretrial motion, Mr. Worthen sought B.W.'s medical records for *in camera* review to discover information related to her possible denial of abuse, "cognitive and major misinterpretation problems," and a motive to fabricate the allegations deriving from the hatred of her parents.

Mr. Worthen based his motion on Utah R. Evid. 506 (d)(1), which allows for an exception to the psychotherapist-patient privilege found in rule 506 (b) of the Utah Rules of Evidence. Mr. Worthen argued that Rule 506(d)(1) superseded this privilege. It states that no privilege exists under this rule if the patient's "physical, mental, or emotional condition" is relevant "in any proceeding in which that condition is an element of any claim or defense" (Utah R. Evid. 506(d)(1)). The rule 506(d)(1) exception is also limited by the requirement that the petitioner for an *in camera* review must "show, with reasonable certainty, that the sought-after records actually contain 'exculpatory evidence . . . which would be favorable to his [or her] defense'" (*State v. Blake*, 63 P.3d 56 (Utah 2002), p 61, quoting *State v. Cardall*, 982 P.2d 79, (Utah 1999)).

Ruling and Reasoning

The district court granted Mr. Worthen's discovery request, but circumscribed the *in camera* review "to discover any statements concerning the complainant's feelings toward her parents." The state then filed an interlocutory appeal to the order. The court of appeals affirmed the trial court's ruling, first by holding that the trial court "sufficiently addressed whether Defendant's request fell within an exception" to the privilege "before addressing the reasonable certainty test" (*State v. Worthen*, 177 P.3d 664 (Utah Ct. App. 2008)). The state also contended that Mr. Worthen's inquiry was merely impeachment evidence. The court of appeals rejected this argument holding that the defendant in a criminal case bears no burden of persuasion, relying on *State v. Spillers*, 152 P.3d 315 (Utah 2007).

The court of appeals further held that specific impeachment evidence, or evidence that is "directed toward revealing possible biases, prejudices, or ulterior motives of the witness" would satisfy the requirements of rule 506 (d)(1). Finally, the court of appeals concluded that B.W's records were authentic and likely contained exculpatory evidence, thereby ruling that Mr. Worthen's claim passed the reasonable-certainty test.

The state and *guardian ad litem* petitioned the Utah Supreme Court for *certiorari* review. Review was granted, and the supreme court found that the court of appeals had failed to conclude whether B.W.'s feelings or emotions toward her parents constituted a physical, mental, or emotional condition under rule 506(d)(1), and if so, whether that condition was an element of Mr. Worthen's defense. It then expounded on those matters.

The state argued that only a formal medical diagnosis would qualify as "a condition" under the rule. Rejecting this, the supreme court held that a mental or emotional condition under rule 506(d)(1) is not limited to diagnosable disorders, yet it noted too that mere transitory circumstances of emotion or mental processes are not sufficient to qualify as a "condition" under the rule 506(d)(1). In reference to the state's argument that Mr. Worthen's request was merely for the purposes of impeachment evidence, the court held that impeachment evidence may qualify as an element of a claim or defense because specific impeachment related to B.W.'s emotional or mental condition was a central element to Mr. Worthen's defense. Next, the court ruled that Mr. Worthen showed, with reasonable certainty, that the requested records would have exculpatory evidence as he had provided 13 journal entries outlining B.W.'s anger and hatred directed toward him, along with related information in her discharge summaries from UNI and a calendar of her therapy appointments.

Discussion

The most fundamental and applicable question that was given to the court in *State v. Worthen* was whether B.W.'s feelings and emotions toward her parents were a mental or emotional condition under rule 506(d)(1). The term "condition" as used in the rule can have a broad and indistinct interpretation. The state argued for a more narrowly defined analysis, that a condition could be defined only within the bounds of a medical diagnosis. The question of what constitutes a mental condition was dissected by the court, which gave it a more expansive interpretation. The court primarily followed the paradigm of temporality, explaining that while an instance of emotion is transitory, on the contrary, a persisting, chronic emotional condition "is a state that persists over time and significantly affects a person's perceptions, behavior, or decision making . . ." (*Worthen*, p 1151). In this regard, the court found that the journal entries and the discharge documentation supported Mr. Worthen's claim that B.W. harbored extreme and persistent hatred toward him and this condition was an element of his defense in that it might be a motive for her to fabricate the allegations against him. While the court broadened the scope of what constitutes a condition beyond that of a diagnosable disorder or diagnosis, the boundaries of the term were not so broad as to include momentary states of mind. Such broad interpretation could have the potential to undermine the doctor-patient or psychotherapist-patient privilege.

The psychotherapist-patient privilege in Utah enjoys further protection in the relatively high standard of "reasonable certainty" that must be met by the party requesting an exception under rule 506(d)(1). Other states, such as Michigan (see *State v. Stanaway*, 521 N.W.2d 557 (Mich. 1994)), have met the competing interests of discovery as against privilege in different ways (for example by calibrating the standard of proof required to obtain evidence from privileged records of the complainant). In factual circumstances not unlike *Worthen*, the Michigan Supreme Court in *Stanaway* held that therapy records would be subject to *in camera* review if "the defendant has a good-faith belief, grounded on some demonstrable tact [sic], that there is a reasonable probability that the records are likely to contain material information necessary to the defense" (*Stanaway*, p 574). The Michigan standard of proof is thus more liberal, an amalgam of good faith and probable cause.

Society has placed considerable value on the psychotherapist-patient privilege. It does so on several grounds, including the belief that therapy will be compromised or ineffective if the patient cannot be assured of the confidentiality of the communications with a trusted other. Our legal system also places great value on fairness and due process, especially in criminal proceedings. The right to confront witnesses is embodied in the Sixth Amendment. When

possible exculpatory evidence may lie in medical records sought by a criminal defendant, due process and claims of privilege collide. Different jurisdictions resolve this collision of values in different ways. For example in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the psychotherapist-patient privilege found protection in federal civil proceedings under Federal Rule of Evidence 501.

The Utah Supreme Court in *Worthen* balanced the high burden of proof it places on defendants who seek discovery, by liberalizing the definition of "mental conditions" of the patient that can count as elements of the defense. This allows at least for *in camera* review. Should the liberalization go even farther? Theoretically, a complainant in a situation similar to that of B.W. could experience feelings that have no longitudinal trajectory, that are merely fleeting, temporary emotions but that could still engender an abuse accusation. Such allegations, which might deprive a defendant of his liberty, argue for a constitutional right of a defendant to request deep discovery of evidence even if the stringent "reasonable certainty" test were not met. In considering the value of maintaining confidentiality versus the due process rights of defendants we must not be neglectful of the discovery process, as it too provides a measure of balance in the competing interests of a complainant's privacy and the defendant's rights of discovery of exculpatory evidence. Namely, *in camera* viewing of any records that are considered to be privileged should be confined to the trial judge who limits disclosure to the relevant, exculpatory communications.

Disclosures of financial or other potential conflicts of interest: None.

The Duty to Protect From Third Parties: Common Law Versus Statute

Thomas Hartwig, MD
Resident in Psychiatry

Lizette Solis, MD
Resident in Psychiatry

Craig Lemmen, MD
Director, Fellowship In Forensic Psychiatry

Department of Psychiatry
University of Michigan
Ann Arbor, MI

In Considering Third-Party Claims Against Mental Health Providers, Alabama and Michigan Courts Reach Different Results Based on Degree of Abrogation of Common Law by Enacted Statutes

Two state supreme court decisions dealt with medical malpractice cases, each based on third-party liability claims. These two decisions illustrate the relationship between common law and statutory law in resolving such duty to protect actions. In the Alabama case, *Mosley v. Brookwood Health Services*, 24 So.3d 430 (Ala. 2009), medical liability is governed by the Alabama Medical Liability Act of 1987 [Ala. Code §§ 6-5-480 to 6-5-488]. This law expressly states that it applies to any action for injury, damages, or wrongful death and thus eliminates any common law principles from use by plaintiffs. The straightforward application of the statute functions to limit liability for malpractice defendants and eases the burden on the health care system. In our second case, the statute in question comes from the Michigan Mental Health Code (MMHC) (1974) [Mich. Comp. Laws §§ 330.1100 to 2106]. The MMHC is a wide-ranging document that has the overarching purpose of protecting mental health consumers. The question in *Dawe v. Dr. Reuven Bar-Levav & Assocs.*, 780 N.W.2d 272 (Mich. 2010), is the degree to which the relevant statute, Mich. Comp. Laws § 330.1946, is intended to replace common law pertaining to a psychiatrist's *Tarasoff* duty.

Mosley v. Brookwood Health Services, Inc.

Facts of the Case

In March 2003, Ms. Sarah Mosley was an inpatient at Brookwood Medical Center in Alabama. "Patient A" (as she was referred to in court documents) was also in treatment there. Patient A had required a time out that morning at 9:15 a.m., but was subsequently quiet and calm during routine checks between 9:30 a.m. and noon. Then at 12:15 p.m., she suddenly attacked Ms. Mosley. Ms. Mosley sustained injuries and filed a medical malpractice lawsuit against the hospital as a result of being attacked. She alleged that the hospital negligently failed to seclude Patient A after her combative behavior and had negligently failed to contact a doctor for authorization to seclude. Deposition testimony by a hospital staff member established that routine unit procedures included 15-minute checks, a 15-minute time out for combative patients, and a 15-minute